In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 418

FEDERAL POWER COMMISSION, *Petitioner*

v.

STATE OF WISCONSIN, PUBLIC SERVICE COMMISSION OF WISCONSIN, ET AL.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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REPLY BRIEF FOR THE FEDERAL POWER COMMISSION

I

Respondents argue (Br. pp. 28, 44) that where it is established, as the Commission found, that the sales or transportation by Phillips are sales for resale or

transportation in interstate commerce, the inquiry is at an end. Acceptance of this contention would produce results wholly contrary to the language of the statute and to the clear intention of Congress as shown by the legislative history.

The statute on its face exempts production and gathering from the regulation of interstate sales and transportation. Since only interstate sales for resale and transportation were being regulated, this could only mean that when such sales and transportation occur during the course of gathering they were to be exempt.

Sales of gas destined for resale in another state are sales in interstate commerce for resale, even where made at the wellhead or otherwise made during the course of production and gathering. *Interstate Natural Gas Co., Inc.*, v. *Federal Power Commission*, 331 U.S. 682, 689; cf *Dahnke-Walker Milling Co.* v. *Bondurant*, 257 U.S. 282. Furthermore, interstate transportation of natural gas may, and does in this instance, start during production and gathering. There can be no doubt that transportation and sales at the beginning or in the middle of the gathering process were intended to be exempt. And if this is so, respondents' argument falls.

Respondent asserts (Br. p. 45) that the legislative history shows that the exemption was thought to be unnecessary. But the passage quoted indicates that this was because the matter exempted, *viz.*, production and gathering was believed *not* included in the affirmative provisions of Section 1 (b), rather than the

contrary.[1] Respondents attempt to support their position by asserting that production and gathering refer only to the physical incidents of those operations. But even if that were true, it would not sustain their contention. For production and gathering may, and frequently do, as here, involve the transportation of gas in interstate commerce. Although such transportation during the course of gathering was undoubtedly exempted, it would not be under respondents' test.

II

Respondents characterize petitioners' position as a contention "that Congress intended to leave a 'twilight zone' (or 'gap') in the regulatory process between the end of state and the beginning of federal regulation" (Resp. Br. 51). They argue that "If the judgment below is reversed the 'gap' Congress intended to close will be revived * * *" (Resp. Br. 34).

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[1] It is worthy of note that the House committee report which respondents quote in support of their contention affirmatively discloses that there was no intent to broaden the scope of the Act by the change in language. Thus, the committee report, after stating that the reference to production or gathering was not necessary, said:

> * * * but similar language was in previous bills, and, rather than invite the contention, however unfounded, that the elimination of the negative language would broaden the scope of the act, the committee has included it in this bill. * * *

It is clear that H. R. 11662, one of the previous bills referred to, did not apply to a producer or gatherer, such as Phillips, who did not operate transmission lines (see main brief, pp. 42-48; Phillips brief, p. 34, n. 27).

Nothing could be more inaccurate. The Commission has from the beginning pursued without deviation a course which foreclosed the existence of any gap in the regulation of the natural-gas industry. The new gap which respondents envisage has been created by them out of the necessities of their argument.

As this Court has often recognized, the Natural Gas Act was designed to provide for federal regulation in the area which this Court's decision had barred to the states, the area commonly described as "the gap." For reasons set forth in our main brief (pp. 56-57), we do not think that the transactions here involved fall within that gap. Furthermore, if the contrary should be assumed *arguendo,* the statute itself would close the gap. Clearly Congress did not believe and was not aware that it was creating any gap; its primary intent was to insure that there would no longer be a hiatus in regulatory power. Statutes are to be construed in the manner best calculated to carry out the purpose of the legislature [2] and to avoid extreme or absurd results. [3]

This means that, if there were any doubts as to the power of the states to regulate production and gathering, those doubts would be removed by the Natural

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[2] *United States* v. *American Trucking Assn's,* 310 U.S. 534, 543; *Harrison* v. *Northern Trust Co.,* 317 U.S. 476, 479; *Southland Gasoline Co.* v. *Bayley,* 319 U.S. 44, 47; *National Labor Relations Board* v. *Hearst Publications, Inc.,* 322 U.S. 111, 124; *United States* v. *C.I.O.,* 335 U.S. 106, 112.

[3] *Armstrong Co.* v. *Nu-Enamel Corp.,* 305 U.S. 315, 333; *Sorrells* v. *United States,* 287 U.S. 435, 447.

Gas Act itself. Congress, of course, has the power to permit the states to regulate the interstate aspects of any business. *Prudential Insurance Co.* v. *Benjamin,* 328 U.S. 408, and cases cited at p. 433 n. The exemption for production and gathering meant that Congress intended those subjects to be regulable by the states. This Court has so interpreted another part of the same exemption clause in Section 1 (b) of the Gas Act in *Panhandle Eastern Pipe Line Co.* v. *Public Service Commission of Indiana,* 332 U.S. 507, 521. Section 1 (b) provides that the Act shall apply, *inter alia,* to sales for resale, but not "to any other * * * sale of natural gas." This was held to constitute authorization for the states to regulate sales to industrial consumers —not for resale, the Court saying (p. 521):

> "The Natural Gas Act therefore was not merely ineffective to exclude the sales now in question from state control. Rather both its policy and its terms confirm that control. More than "silence" of Congress is involved. The declaration, though not identical in terms with the one made by the McCarran Act, 59 Stat. 33, 15 U.S.C. § 1011, concerning continued state regulation of the insurance business, is in effect equally clear, in view of the Act's historical setting, legislative history and objects, to show intention for the states to continue with regulation where Congress has not expressly taken over. Cf. *Prudential Ins. Co.* v. *Benjamin,* 328 U.S. 408. Congress has undoubted power to define the distribution of power over

interstate commerce. *Southern Pacific Co.* v. *Arizona,* 325 U.S. 761, 769, and authorities cited; cf. *Prudential Ins. Co.* v. *Benjamin, supra.* Here the power has been exercised in a manner wholly inconsistent with the exclusion of state authority over the sales in question."

This reasoning is equally applicable to the parallel exemption for production and gathering.

III

It is argued by *amici curiae* that regulation by the Commission of the sales of natural gas by independent producers and gatherers is essential to protect the ultimate consumers. But the legislative history of the Act, as shown in our main brief at pages 29-64, is barren of any conflict or even an intimation of conflict between the producing and gathering companies on the one hand, and consumer interests on the other. The wrath of the consumers was directed at that time solely against the abuses perpetrated by the interstate transmission pipeline companies. Subsequent changes in consumer desires, of course, have no bearing upon the intent of Congress in 1938 when it passed the Act.

Moreover, it is not to be assumed that Congress believed that state regulation of sales by independent producers and gatherers would not in the long run be advantageous to consumers throughout the country. Commissioner Murray of the Texas Railroad Commission aptly stated (R. II 429-430):

If you are going to come down here and freeze a low price, then that would work to your temporary advantage. I am saying you now are representing the consumers up there, but pretty soon—that is the one thing we ran into, the courts nearly knocked our orders out on, this flared gas, because we were ordering them to do something that they could show had to be done at a loss, and by the rise in price that has taken place in the last few years, it has made it possible for us to get this billions of feet of casinghead gas utilized.

You say your consumers are paying the bill. What is a few cents a thousand when we market that gas down here—I don't know what you pay, but a few cents a thousand isn't a very big percentage of your retail price up there. The cost of transporting it and all is so much bigger than three cents, or five cents or ten cents a thousand, and yet it means a difference down here, whether we can afford to save it and whether we can afford to drill for it and develop it. What are you going to do if we can't afford to keep on developing our gas? You'll have to double your price in order to amortize your pipe line over a short period of time and then you are out of gas.

I am representing the Railroad Commission and we are intervening in this case, but we don't stand in Phillips' shoes here and we don't expect them to accept everything we say. Heck, we have a lot

> of controversy with Phillips down here. Our duty is to the consumer. There are a devil of a lot more consumers in Texas than producers, but our duty is to see they have a supply of gas over the years, and we think we are looking after the interest of consumers in Wisconsin just as much as we are in Texas.

The entire public, including of course consumers in both consuming and producing states, is vitally interested in the conservation of gas. Just as the Commission has always recognized the valid interests of the consumers, so it has also given recognition to the problems of conservation which are of paramount interest to all, consumers and non-consumers alike. As early as 1940, a scant two years after the passage of the Gas Act, the Commission stated in its Twentieth Annual Report (page 79):

> * * * The question should be raised as to whether the proposed use of natural gas would not result in displacing a less valuable fuel and create hardships in the industry already supplying the market, while at the same time rapidly depleting the country's natural-gas reserves. Although, for a period of perhaps 20 years, the natural gas could be so priced as to appear to offer an apparent saving in fuel costs, this would mean simply that social costs which must eventually be paid had been ignored.

An abundant supply of natural gas to consumers at the lowest reasonable price can be best assured through conservation measures undertaken by the states concerned. (R. II 435.) Consequently, not only the producers but also the consumers have a stake in conserving natural-gas, a non-replaceable, wasting resource. (R. II 428-430; 459-460.)

The level of prices paid producers and gatherers is determinative of whether the business in which they are engaged will continue to exist as a healthy segment of the national economy. And this will not be accomplished at the expense of the consumers, for "the wellhead price of gas is but a fraction of the price paid by domestic consumers at the burner-tip, so that the field price * * * may have little or no effect on the domestic delivered price." *Cities Service Gas Co.* v. *Peerless Oil & Gas Co.*, 340 U.S. 179, 187. Figures showing how small the proportion of field prices are to the city prices are set forth in the brief for petitioner Phillips in No. 280, pp. 87-89.

IV

Respondents suggest (Br. pp. 24, 69n) that the Commission's brief abandons the argument based upon a statement in the *Interstate Natural Gas* case, 331 U.S. 682, 690, as to the significance of possible interference with state regulatory functions in determining the scope of the jurisdiction of the Federal Power Commission. We are not aware that the argument had

been abandoned, but thought that it had been presented at pp. 82-87 of our main brief.

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